Supreme Court, U. S.
FILED
SEP 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1386

BEN KLEIN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANCIS M. GREGORY, JR.
CAROLYN P. CHIECHI
1666 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N. W.
Washington, D. C. 20006
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1386

BEN KLEIN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I.

The United States, in a motion to publish the opinion of the Tenth Circuit, stated that this case has enunciated:

> " 'new points of law making the decision of value as a precedent, and contains some legal issues not previously decided by the Tenth Circuit or the Supreme Court. The decision also contains points of law which, in our experience, will solve recurring problems faced by the United States and expedite future trials of tax as well as non-tax matters.' "

In expanding upon this comment, the United States, as explained in our petition, referred specifically and in detail to four of the issues raised in our petition.[1]

In his memorandum in opposition to our petition, Solicitor General Bork chooses to ignore this motion of the United States and the description of the issues contained therein. Frankly we were shocked by the Solicitor General's cavalier treatment of the points discussed in our petition. And his silence concerning the commentary of the United States in its motion to publish can be read only as an admission that he has no response to the characterization of the importance of the issues contained therein.

The issues raised in our petition are worthy of review on their own merits, but their importance is intensified when it is recognized that they arise in the context of a net worth income tax prosecution. In *Holland* v. *United States*, 348 U.S. 121 (1954), this Court expounded in considerable detail on the dangers inherent in the net worth method:

> "Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear,* including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (Emphasis added.)

[1] This motion, which is reprinted as Appendix C to our petition, pages 14a-16a was signed for the United States by James L. Treece, United States Attorney for the District of Colorado, Richard J. Spelts, Assistant United States Attorney, and John W. Madden, Special Assistant United States Attorney.

If the laxity of the judge in instructing the jury on the issue of criminal responsibility is not sufficient proof of the lack of adherence to *Holland* admonitions in this case, the other departures from *Holland's* admonition to use the net worth method with particular care require that this defendant be given a new trial.

II.

We urged in our petition that the District Court's instruction on the standard of criminal responsibility was patently eroneous on its face and amounted to a directed verdict on the issue of petitioner Klein's mental capacity to commit the offenses charged. The response of the Solicitor General is an assertion that our argument ignores the first paragraph of the two paragraph instruction, which paragraphs he quotes accurately as follows:

> "A person is not criminally responsible for his conduct if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to confirm his conduct to the requirements of the law.
>
> *As applied to this case,* the test for criminal responsibility on the part of the defendant means that before you may return a verdict of guilty, you must be convinced beyond a reasonable doubt that the defendant committed the act with which he is charged, if you find he did commit the act, he was mentally capable of knowing what he was doing, was mentally capable of knowing it was

> wrong, and was mentally capable of controlling his conduct." [Emphasis added.]

The Solicitor then argues that the two paragraphs taken together make it quite clear to the jury that the issue of competency was a separate and essential element of the offense charged.[2] In so doing the Solicitor completely ignores the issue raised in our petition. We agree with his suggestion that the first paragraph of the instruction states the *general rule* concerning criminal responsibility. However, the second paragraph—which the trial judge informed the jury applied the general rule "to this case"—when read, either in silence or aloud, constitutes a *directed verdict* on the issue of mental capacity. All the jury had to find was that the defendant committed the act with which he was charged. The jury was instructed by the Judge to then find *automatically* that the defendant was mentally competent to commit that act. We establish in our petition that it is unconscionable to allow a conviction to stand on the basis of such an instruction under any circumstances. It is particularly egregious where mental capacity was one of the prime issues in the case from the outset.

III.

Without citation to Code or case, the Solicitor General dismisses our argument that this Court should review the ruling of the Tenth Circuit that a trial court may admit without limitation in a net worth income tax evasion case a certificate of assessment and a record

[2] The Solicitor's approach in responding is a tacit admission of the merit of our argument, for he makes no effort to defend the legitimacy of the second paragraph standing alone--the one which the Court instructed the jury to apply "to this case."

of payments concerning a third party's alleged failure to file a gift tax return. This ruling *must* be reviewed because, as explained herein and in our petition, it sanctions a flagrant violation of the most basic concepts of due process in the administration of federal criminal justice.

A trial petitioner claimed that he had received between $48,000 and $53,000 in gifts from his father during the five indictment years. The Government in constructing its net worth case conceded that $11,000 in cash gifts were in fact made. The Government then introduced, without a limiting instruction and over objection, a certificate of assessment and payment (IRS Form 870) which purported to demonstrate that Sam Klein, petitioner's father, had failed to file a single gift tax return during the period 1956 through 1970. This evidence was presented to the jury to support the position of the United States that the gifts claimed by petitioner in fact were not made.

In attempting to justify, for the first time ever as far as we can determine, the introduction of the certificate of assessments and payments relating to a third party, the Solicitor General states:

> "In order to refute petitioner's claim that his father made additional gifts to him of between $37,000 and $42,000, the government introduced a certificate of assessment and payments showing that his father had not filed any federal gift tax returns during the entire period 1956 to 1970. *If the alleged gifts had been made, petitioner's father would have been required to file gift tax returns. Thus, if petitioner's father did not comply with the gift tax return filing requirement, the jury could consider that fact in determining whether the alleged gifts had been made,* since if no gifts had been made that would negate the

> existence of a nontaxable source of petitioner's unreported net income. On these facts, the trial court correctly admitted this evidence for the jury to consider in appraising petitioner's defense that he received gifts from his father." [Emphasis added.]

In terms of elementary fairness, this tactic is reprehensible. Petitioner had no legal responsibility whatever for filing Sam Klein's gift tax return, yet the United States maintains that the failure of a third party to take an action required *only* of the third party is admissible evidence against petitioner.

The law of this case as enunciated by the Tenth Circuit will allow the United States to prosecute an income tax evasion case based in large measure on the negligent or willful failure of a third party to file a gift tax return. Such a holding is harsh enough when the third party would owe a gift tax if the returns were filed, but the gross and unjustified prejudice of the application of this holding to petitioner is made more apparent by a short analysis of the facts in this case.

The total gifts claimed by petitioner amount to no more than $53,000 over a five year period. The Government's own certificate of assessments and payments reveals no gift tax return filed by petitioner's father from 1956 through 1970, during which period both petitioner's father and mother were living. Thus, on the Government's own demonstration, and taking into account the annual exclusion provided under 26 U.S.C. § 2503(b) and the lifetime exemption provided by 26 U.S.C. § 2521, *there is no evidence that any gift tax would have been due even if gift tax returns were filed by Sam Klein or his wife.*

Neither the Internal Revenue Code nor the Treasury Regulations provides a civil penalty for the failure to file a gift tax return when no tax is due, and there is certainly no inference in the Code nor any decided case that the failure to file a gift tax return carries a presumption that a gift was not made. Yet the Tenth Circuit's ruling allows the introduction of evidence that gift tax returns were not filed *without even a showing that a tax was due if the gifts in fact were made.* No amount of semantics can obscure the fact that this is tantamount to allowing a jury in a criminal case to assume that the failure to file the return is probative evidence that the gifts were not made. Such a result is unsupportable when there is no showing that the person who allegedly had the obligation to file the return owed taxes or would incur a penalty for failure to file.

The United States conceded in its motion to publish the *Klein* decision that the court's holding involves a novel and important question in the administration of federal criminal justice:

> "GIFT TAX RETURNS: *Klein* is the first case of which we are aware to decide the issue whether it is proper in meeting a claimed defense of large cash gifts from a third party to introduce evidence that the third party (here the father) failed to file any gift tax returns for the alleged cash gifts. *Klein,* at 2, 13. This is probative to whether the alleged cash gift was, in fact, made."

The Solicitor General has offered no reason to refute the compelling conclusion that the decision of the Tenth Circuit is novel and important. This Court should review it and must issue clear and precise standards with respect to whether, and under what con-

ditions, such highly prejudicial evidence of questionable probative value can be admitted.

IV.

Petitioner has raised three other substantive issues requiring the issuance of a writ of certiorari. We demonstrated in our petition that the Court should review each issue, and quoted from the motion of the United States to publish the decision of the Tenth Circuit to prove that each issue involved novel and important questions in the administration of federal criminal justice. With respect to each issue the Solicitor General ignores the motion of the United States in the Tenth Circuit. There is no need to restate in detail why certiorari should be granted on each issue, but some comments are required.

Section 4244

It is beyond dispute that an examination with respect to competency to stand trial is more limited in scope than an examination to determine mental capacity to commit the offense charged. Petition, pp. 12-15. A serious question in the administration of federal criminal justice is raised when a 4244 examination serves as a basis for testimony concerning mental capacity, particularly when as here the accused had no notice that the 4244 examination would be so used.

Summaries

The solicitor General ignores the brief of the United States in the Tenth Circuit and contents himself with quoting the Tenth Circuit's conclusion that the Revenue Agent-Summary Witness "was put on the

stand to summarize only the Government's case, not all of the evidence then in."

The following quotation from page 208 of the transcript refutes this conclusion and demonstrates that the Government's concession in its brief on appeal that the summary witness based his testimony on all of the evidence then introduced correctly reflected the record:

> "Q. Are you stating Mr. Gehres that the figures in this computation [are] based on all the evidence documentary and testimony that has been presented in this trial to this point.
> "A. Yes."

It hardly seems necessary to support the proposition that it is a violation of due process to allow a summary witness, who without question was one of the key witnesses for the prosecution, to purport to summarize all of the evidence in the case when in fact he summarizes only the Government's evidence, and fails to summarize evidence that would substantially contradict the Government's case.[3]

1971 Return

No court that has considered the question had ever held that a subsequent year's tax return may be introduced generally and without limiting instructions in a net worth case. In fact, as explained by the United States, only one decision 46 years ago affirmatively

---

[3] The effect of this error on the jury had to be devastating. At page 2359, the Judge instructed:

> "As I've told you, those exhibits are not actual evidence, but they are admitted as summaries of evidence in the case, and they are admitted only for your assistance and convenience in considering the other evidence *which they purport to summarize.*" [Emphasis added.]

approved introduction of a post-indictment return under any circumstances:

> "The only case other than Klein of which we are aware approving introduction by the United States of a subsequent return is *Lisansky* v. *United States*, 31 F.2d 846, 851 (4th Cir. 1929)."[4]

The question presented by this issue is vital to prospective defendants in net worth income tax evasion cases and should be reviewed by this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant a writ of certiorari and reverse the judgment of the Tenth Circuit summarily, or, in the alternative, calendar the case for argument on the merits.

Respectfully submitted,

FRANCIS M. GREGORY, JR.
CAROLYN P. CHIECHI
1666 K Street, N. W.
Washington, D. C. 20006

Counsel for Petitioner

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N. W.
Washington, D. C. 20006

Of Counsel

September 15, 1975

---

[4] The facts of *Lisansky* are totally inapposite here. The Fourth Circuit refused to reverse the trial court because it was argued that the subsequent year's return was false, thereby showing fraudulent intent, and because it tended to contradict statements concerning transactions in prior years. Neither circumstance is present in this case.